ISABELA MADELINE ROY & ORS

v.

SARIMAH LOW ABDULLAH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL SUIT NO: S4(3)-22-795-1999]
12 OCTOBER 2004

FAMILY LAW: *Marriage - Christian marriage - Eurasian Christian contracting polygamous marriage - Second marriage thereof - Whether null and void and of no effect - Inheritance - Whether wife and children in second marriage had any right to inheritance - Law Reform (Marriage and Divorce) Act 1976 ss. 5, 6*

In 1957, one Teddy Rock Roy ('the deceased') married the first defendant. Being a monogamous marriage, it was deemed registered under the Law Reform (Marriage and Divorce) Act 1976. Subsequently, the first defendant left the deceased and in 1968 went through a civil marriage with one Subramaniam. In 1973, the first defendant converted to Islam and entered into a Muslim marriage with another man. In 1980, the deceased contracted a civil marriage with the second defendant, notwithstanding that there was no evidence that the first defendant had died at the material time or that he had divorced the first defendant. Following the deceased's death in 1998, the second defendant, together with her children from her marriage to the deceased (the third and fourth defendants), staked a claim to the estate of the deceased. The plaintiffs, the children of the deceased and the first defendant, contended that there was no valid marriage between the deceased and the second defendant, that the second, third and fourth defendants had no right of succession or inheritance in law to the deceased's estate, and in the circumstances, applied for a declaration to the effect.

Held (allowing the declaration and dismissing the counter-claim):

[1] Since the deceased had contracted a monogamous marriage with the first defendant, and since there was no evidence that he had divorced the latter, or of the latter's death at the material time, the deceased had no capacity to enter into a marriage with the second defendant. Being a

Eurasian Christian, the deceased just had no capacity to enter into a polygamous marriage with the second defendant in 1980. The second defendant, therefore, had no right of succession or inheritance. (p 304 d-e)

[1a] The first defendant, likewise, had no capacity to marry Subramaniam because she was still married to the deceased. Her conversion to Islam too, did not, by itself, dissolve the deceased's marriage to her. (p 305 a)

[2] The deceased's marriage to the second defendant, in the circumstances, was null and void and of no effect. It followed that the third and fourth defendants had no right of inheritance from the estate of the deceased, there being no valid marriage between their parents. "Child" by virtue of the Distribution Act 1958, must mean "legitimate child". (p 305 d)

[3] The flat known as No. 15034, Block 15, Flat Razak Mansion in Jalan Sungei Besi, Kuala Lumpur is not the subject matter of a valid assignment by the deceased to the second defendant. There was no or no complete documentation of such an assignment and there was no approval of such a transaction by the Datuk Bandar (Mayor) as required by the terms of the relevant sale and purchase agreement entered into in respect of the flat between the deceased and the Datuk Bandar. (p 305 f-g)

Case(s) referred to:
Chin Moi & Anor. v. Chew Pen Hock [1976] 1 MLJ 190 ***(refd)***
Eeswari Visuvalingam v. Government of Malaysia [1990] 1 MLJ 86 ***(refd)***
Malayawata Steel Berhad v. Government of Malaysia & Anor [1977] 2 MLJ 215 ***(refd)***
Pedley v. Majlis Ugama Islam Pulau Pinang & Anor [1990] 2 MLJ 307 ***(refd)***
Re Ding Do Ca, deceased [1966] 2 MLJ 220 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 5, 6

For the plaintiffs - PS Rajan (Kailesh); M/s Kailesh Aru & Co
For the 2nd, 3rd & 4th defendants - Nadarajan/ (AG Dass); M/s Bosco Philip Anthony & Assocs

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:

It is not disputed on the pleadings that the plaintiffs are the children of Teddy Rock Roy ("the deceased") from his marriage with the 1st defendant. The deceased entered into a Christian marriage with the 1st defendant on 24 April 1957. It was a monogamous marriage and was deemed to be registered under s. 4(2) of the Law Reform (Marriage and Divorce) Act 1976. A copy of the marriage certificate is at p. 1 of the plaintiffs' Bundle of Documents ("P1"). The 1st defendant later left the deceased and apparently became a Muslim and entered into a Muslim marriage with another man. She has not entered an appearance to this action although she has been served with the writ of summons (see the Affidavit of Service by Morgan Lawrence Roy, who is the 5th plaintiff - he personally served the writ on his mother the 1st defendant). There is no evidence that the deceased divorced the 1st defendant, although he could have done so if he had wanted to. The deceased entered into a civil marriage with the 2nd defendant on 3 June 1980: see copy of the marriage certificate at p. 6 of the 3rd and 4th defendants' Bundle of Documents ("D2"). He had falsely stated that he was a divorced man when he married the 2nd defendant. Since the deceased had contracted a monogamous marriage with the 1st defendant, the deceased had no capacity to enter into the marriage with the 2nd defendant, while the 1st defendant was still alive. The 2nd defendant therefore has no right of succession or inheritance. (See The Law Reform (Marriage and Divorce) Act 1976, ss. 5 & 6). The deceased died on 22 August 1998 (see the copy of the death certificate at p. 12 of P1).

There is no evidence that the 1st defendant has died or, more specifically, that she had already died so as to make the deceased a widower, when the deceased entered into the civil marriage with the 2nd defendant. Since there is evidence that the deceased and the 1st defendant were both alive earlier, the court must presume, until the contrary is proven, that they were both alive when the deceased entered into the civil marriage with the 2nd defendant. Since there is the certificate regarding the marriage of the deceased and the 1st defendant in 1957, the burden shifts to the other defendants to prove facts showing that the deceased had the capacity (through dissolution of marriage by divorce, nullity or death of the 1st defendant) to marry the 2nd defendant. (See *Eeswari Visuvalingam v. Government of Malaysi*a [1990] 1 MLJ 86). The 1st defendant had gone through a civil marriage ceremony with one Subramanian a/l Letchumanan on 26 January 1968 (see the copy of the marriage certificate at p. 66 of D2). The 1st defendant had embraced Islam on 10 August 1973 (see the copy of the certificate at p. 4 of D2). The 1st

defendant had no capacity to marry Mr. Subramaniam because she was still married to the deceased. The 1st defendant's conversion to Islam did not, by itself, dissolve the deceased's marriage to her (see *Pedley v. Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307).

The deceased had no capacity to enter into a polygamous marriage on 23 May 1980 with the 2nd defendant. He was a Christian Eurasian. He was not a Chinese. Therefore, *Re Ding Do Ca, deceased* [1966] 2 MLJ 220, in which it was reiterated that, in the case of the Chinese, their personal law is based on the race, and not their religion, does not apply. Having entered into a Christian marriage, the deceased could not lawfully, while that marriage was subsisting, marry another woman. (See *In the Estate of Pang Soo Ho, deceased* [1982] 2 MLJ 147). Therefore, the deceased's subsequent marriages, including to the 2nd defendant on 23 May 1980, are null and void and of no effect. This is because the deceased continued to be the husband of the 1st defendant. The 3rd and 4th defendants have no right of inheritance from the estate of the deceased because there was no valid marriage between their parents, namely the deceased and the 2nd defendant. "Child" must mean legitimate child. (See: The Distribution Act 1958, s. 3).

The court has the jurisdiction to make the declarations prayed for. (See *Chin Moi & Anor v. Chew Pen Hock* [1976] 1 MLJ 190). The plaintiffs therefore seek the declarations prayed for and the counterclaim should be dismissed with costs.

The flat known as No. 15034, Block 15, Flat Razak Mansion in Jalan Sungei Besi, Kuala Lumpur is not the subject matter of a valid assignment created by the deceased. There is no or no complete documentation of such an assignment and there is no approval of such a transaction from the Datuk Bandar. The benefit of the sale and purchase agreement entered into by the deceased with the Datuk Bandar (see pp. 16-26 of D2) may be assigned by the deceased only with the consent of the Datuk Bandar. Section 6.04 of the agreement provides that the agreement is binding upon the permitted assigns of the deceased (see p. 23 of D2, where the words "penerima serahan yang dibenarkan" are used). By s. 4.05 of the agreement (see p. 21 of D2), the deceased was bound by two specific restrictions against dealing with the flat. The restrictions were:

(a) a five-year restriction against transactions regarding the flat, time to run from the date of full payment of the purchase price; and

(b) the prior written consent from the Datuk Bandar.

The final instalment was to be paid in June 1992 (see p. 30 of D2). Therefore, no transaction in respect of the flat could be undertaken until after the last payment was made. However, before the five eyar period was to expire in June 1997, M/s AJ Ariffin, Yeo & Harpal purported to deliver a Deed of Assignment to the Datuk Bandar (see p. 35 of D2). The Datuk Bandar rejected that transaction because "pemohon tidak mendaftar bagi tujuan di atas" and sent a "Borang Penjualan Semula" (it is not a deed of assignment, see pp. 62 and 63 of D2, the words used are "Borang Permohonan Menjual Rumah"). Therefore, there was no valid assignment as the Datuk Bandar had not given consent. In the present case, the solicitors conveyed a premature request to the Datuk Bandar for an assignment to be created. That request was rejected. The condition precedent had not been fulfilled. If an assignment is a conditional one, it is unenforceable (see *Malayawata Steel Berhad v. Government of Malaysia & Anor* [1977] 2 MLJ 215).

There is no trust created either. No document evidencing any trust was produced. No trust is pleaded by the 2nd, 3rd and 4th defendants. They have pleaded an assignment: see paras. 18, 19 and 21 of the defence and counterclaim. The Deed of Assignment or a copy of it (see the letter at p. 35 of D2) has not been produced. Therefore the court draw an adverse inference under illustration (g) to s. 114 of the Evidence Act 1950. The (undisclosed) Deed of Assignment was prepared by DW2 who was an advocate and solicitor and apparently an old friend of the deceased and the 2nd Defendant. DW2 said that he took instructions in the presence of the alleged assignee (the 2nd defendant). At that time, the deceased was already ill and was suffering failing eyesight. DW2 was aware of the deceased's earlier marriage. The position of the children of the earlier marriage, namely the plaintiffs, was not considered. No medical examination of the deceased was undertaken or advised for the purpose of ascertaining whether he was of sound mind and was not unduly influenced, including by the 2nd defendant. In such a sensitive matter, DW2 should not have taken instructions in the presence of the 2nd defendant, who now claims to be the assignee. DW2 did not advise the deceased to obtain independent legal advice. DW2 prepared a defective deed of assignment or an assignment which could not be perfected.

I am of the opinion that the counterclaim should be dismissed because it would be made, if at all, against the estate of the deceased, which is not a party to this action, and the facts allegedly supporting the counterclaim should be raised, if at all, before the Land Administrator in the proceedings under the Small Estates (Distribution) Act 1955. Furthermore, the counterclaim has not been

brought additionally against the 1st defendant who remained the wife of the deceased and, upon his death, became a beneficiary of his estate. In the absence of a lawful marriage between the deceased and the 2nd defendant, and in the absence of a duly documented and valid assignment by the deceased for the benefit of the 2nd defendant, the counterclaim is hereby dismissed with costs. Order in terms of Lampiran (1).